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In the Supreme Court of the United States

OCTOBER TERM, 1963

NO. 895

BOB AND DOROTHY LEE HINDES, PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	2-3
Specification of Errors to be Urged	4
Reasons for Granting the Writ	4
Conclusion	7
Appendix	8-9

CITATIONS

Cases:

Commissioner vs. **Court Holding Company**, 324 U.S. 331	5
Fraser vs. **Nauts**, 8 F (2) D 106	6
Shaw vs. **Ford Motor Company**, 112 F. Supp. 121	6
U. S. vs. **Isham**, 17 Wall. 496	6
Weeks vs. **Sibley**, 269 F. 155	6

Statutes:

Internal Revenue Code of 1954	
Section 337	8
Section 435	8

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The petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled cause on January 7, 1964.

OPINION BELOW

The opinion of the United States District Court for the Western District of Texas (R. 86-87) is reported in 214 F. Supp. 583. The judgment of the United States Circuit Court of Appeals for the Fifth Circuit (R. 211-216) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 7, 1964. (R. 211-216). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where taxpayers had a choice of selling a ranch for cash or on the installment plan, can the Internal Revenue Service and the lower courts compel taxpayers to accept the cash offer?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, **infra,** pp. 8-9.

STATEMENT

The facts, as found by the District Court (R. 83-86), are not entirely correct. In the early part of 1957, the husband was offered $300,000.00 in cash for a ranch that he and his wife owned and on which they were living. (R. 19). The husband then called on his attorney to learn what the tax consequences would be if he sold the ranch for $300,900.00 cash. (R. 19). Upon being told of the tax consequences, the husband stated that he would not sell. (R. 19). His attorney then suggested that he sell on the installment plan. The husband then informed his attorney that the would-be purchaser had received $300,000.00 from an involuntary conversion and had to reinvest the money in real estate to defer taxation on the profits realized from the involuntary conversion. (R. 19). The attorney then suggested that he would form a corporation and have the corporation purchase the ranch for $265,000.00 payable in ten annual installments. (R. 19). This proposal was accepted. (R. 19).

Some time after the conference with his attorney the husband executed a sales contract with one

Sechris, the man who had offered $300,000.00 for the ranch (R. 79-80).

Upon learning of the execution of the sales contract with Sechrist, the husband's attorney and the husband called on Sechrist in Kerrville, Texas, and secured a release of the sales contract. (R. 19-20).

On the 12th day of June, 1957, taxpayers conveyed the property in question to the Tower Farm & Cattle Company, Inc., for the consideration of $265,000.00, less the amount of a note and interest thereon owing to the Equitable Life Assurance Society of the United States. (R. 20). The net amount receivable by taxpayers after paying said loan and expenses of sale was $206,197.85, for which the Tower Farm & Cattle Company, Inc., executed a note payable to taxpayers in ten annual installments of $20,619.78 each. (R. 20). Thirty days later, the Tower Farm & Cattle Company, Inc., sold the ranch to Sechrist for $300,000.00 cash.

When taxpayers filed their 1957 income tax return, they elected to report the profit from the sale on the installment plan. (R. 20).

On July 17, 1957, the husband borrowed $200,000.00 from the Tower Farm & Cattle Company, Inc., executing a note therefore payable on or before five years from date. (R. 42). Said note was paid in full within the time specified. (R. 21).

Upon examination of petitioners' 1957 income tax return, the examining officer treated the sale as a closed transaction because of the sales con-

tract with Sechrist and the loan from the corporation. (R. 21).

Taxpayers appealed the examining officer's proposed adjustment to the Regional Commissioner's Office in Houston, Texas. That office treated the sale of the ranch as a closed transaction, but computed the profit on a selling price of $300,000.00. (R. 59). Taxpayers paid the deficiency with interest thereon proposed by the Regional Commissioner's Office; filed a timely claim for refund of a portion of the deficiency; brought suit on the rejected claim in the District Court; then filed a motion for partial summary judgment. The defendant did not controvert plaintiffs' motion but filed a cross-motion for summary judgment which the District Court granted. (R. 78, 86, 87).

Taxpayers appealed to the Fifth Circuit Court of Appeals which reversed the judgment of the District Court but held that the sale of the ranch was a closed transaction. (R. 211-216).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that a summary judgment to the extent of the $265,000.00 would be in order on remand.

REASONS FOR GRANTING THE WRIT

The District Court and the Circuit Court of Appeals have held, in effect, that a taxpayer may not sell property on the installment plan if he has an opportunity to sell for cash, thus rendering null and void an act of the Congress. Title 26 USCA, Section 453. In so holding, both Courts have placed

the wrong construction of this Court's holding in **Commissioner** v. **Court Holding Co.**, 324 U.S. 331. The **Court Holding Co.** case, supra, is not in point. And, if it were in point, that holding has been nullified by 26 USCA, Section 337, infra. In the **Court Holding Co.** case, supra, decided by this Court on March 12, 1945, a corporation negotiated with a purchaser to sell its sole asset, an apartment house. The corporation then dissolved and transferred the apartment house to its two stockholders as a liquidating dividend. The stockholders then sold the apartment house to the purchaser. The Tax Court held that the sale had been made by the corporation and this Court affirmed the decision of the Tax Court. In the **Court Holding Case**, supra, the corporation was the alter ego of the stockholders. In the instant case the petitioners had no interest in the corporation. It is true that the husband's parents owned fifty per cent of the Tower Farm & Cattle Company's stock, but since when has a child been taxed on the income of its parents?

Did the lower Courts base their decisions on the fact that the Tower Farm & Cattle Company loaned the husband $200,000.00? If so, then the petitioners received all of the sale price in 1957, since the net sales price to the petitioners was $206,197.85, (R. 21), and the corporation paid the first installment of $20,619.78 in the year 1957, and what is the status of the three installments still owing to petitioners. And what is the status of the interest that has been paid to petitioners since the decision of the District Court, and the

interest that will be paid to petitioners in the future?

Did the lower Courts base their decisions on the fact that the husband had entered into a sales contract with Sechrist before petitioners sold the ranch to the corporation? Each member of this Court knows that an executory contract may be cancelled by agreement of the parties thereto, and the writer will not insult the intelligence of the Court by citing cases in support of this point. The agreement between the husband and the corporation was not enforceable because it was an oral contract for sale of real estate. After Sechrist released the husband from the sales contract, the oral agreement between Sechrist and the corporation was not enforceable for the same reason. If the corporation had sold the ranch to a third party, Sechrist would have had no recourse against anyone.

Finally, the decisions below conflict, in principle, with **Shaw** v. **Ford Motor Company**, 112 F. Supp. 121; **United States** v. **Isham**, 17 Wall. 496; **Weeks** v. **Sibley**, 269, F. 155; **Frazer** v. **Nauts**, 8 F. (2d) 106; and cases to numerous to mention which follow the principles laid down by this Courts in **United States** v. **Isham**.

CONCLUSION

Wherefore it is respectfully submitted that this petition should be granted.

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Of Counsel.

APPENDIX

INTERNAL REVENUE CODE:

Sec. 337—Gain or loss on sales or exchanges in connection with certain liquidations.

(a) General Rule.—If—

(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims,

then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

* * * * * *

Sec. 453—Installment Method.

(a) Dealers in Personal Property — Under regulations prescribed by the Secretary or his delegate, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.

(b) Sales of Realty and Casual Sales of Personality.—

(1) General Rule.—Income from—

(A) a sale or other disposition of real property,* * * * *

may (under regulations prescribed by the Secretary or his delegate) be returned on the basis and in the manner prescribed in subsection (a).

(2) Limitation.—Paragraph (1) shall apply—

(A) In the case of a sale or other disposition during a taxable year beginning after December 31, 1953, (whether or not such taxable year ends after the date of enactment of this title), only if in the taxable year of the sale or other disposition—

(i) there are no payments, or

(ii) the payments (exclusive of evidence of indebtedness of the purchaser) do not exceed 30 percent of the selling price.

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